

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ADRIAN E. WHITAKER,

Plaintiff,

No. CIV S-04-1794 FCD GGH P

vs.

W.N. SADY, et al.,

Defendants.

ORDER

_____/

Plaintiff, a state prisoner proceeding pro se, seeks relief pursuant to 42 U.S.C. § 1983. By order filed on January 12, 2005, plaintiff was directed to complete service of process in accordance with Fed. R. Civ. P. 4, within 60 days. Plaintiff, who had paid the filing fee in full, had been granted the opportunity, by order filed on December 2, 2004, to submit an in forma pauperis affidavit, within 30 days, so that the court could determine whether he could proceed in forma pauperis pursuant to 28 U.S.C. § 1915(a). If so, as he was informed, he would not be assessed any additional filing fee but the court would be able to direct the U.S. Marshal to serve process of his complaint or amended complaint upon any defendant for which service was found appropriate. Plaintiff did not file an in forma pauperis affidavit or an amended complaint, electing to proceed on his original complaint. The original complaint was modified by an order filed on March 8, 2005, adopting the court's January 12, 2005 findings and recommendations.

1 On January 12, 2005, plaintiff was directed to serve process upon the remaining
2 defendant, W. N. Sady, and a summons for defendant Sady was provided to plaintiff. On April
3 27, 2005, plaintiff was granted a final opportunity to serve defendant Sady because he had not
4 effected proper service upon him.

5 Plaintiff was informed that Fed. R. Civ. P. 4(e) provides that service upon
6 individuals within a judicial district from whom a waiver of service has not been obtained may
7 be made by personal service or pursuant to the law of the state in which the district court is
8 located. Because plaintiff did not personally serve defendant Sady, he was required to satisfy
9 California service rules.

10 Although California law permits service of a summons by mail, such service is
11 valid only if a signed acknowledgment is returned and other requirements are complied with.

12 Cal. Code Civ. Pro. § 415.30.¹ The court issued plaintiff another summons. Thereafter, on May
13 9, 2005, plaintiff filed a notice that he had complied with the requirements of § 415.30. On June
14 22, 2005, plaintiff filed a document stating that he had not only complied with the provisions of §
15 415.30 on April 27, 2005 by placing the requisite forms and documents in the Folsom State
16 Prison mailbox and paying for first class postage, but had also hand-delivered a copy of the
17 summons and complaint to the defendant, although he does not note the date of that action.

18 ¹ Cal. Civ. Pro. Code § 415. 30 provides:
19 “(a) A summons may be served by mail as provided in this section. A copy of the summons and
20 of the complaint shall be mailed (by first-class mail or airmail, postage prepaid) to the person to
21 be served, together with two copies of the notice and acknowledgment provided for in
22 subdivision (b) and a return envelope, postage prepaid, addressed to the sender.
23 (b) The notice specified in subdivision (a) shall be in substantially the following form:
24 (Title of court and cause, with action number, to be inserted by the sender prior to mailing)
25 NOTICE
26 To: (Here state the name of the person to be served.)
This summons is served pursuant to Section 415.30 of the California Code of Civil Procedure.
Failure to complete this form and return it to the sender within 20 days may subject you (or the
party on whose behalf you are being served) to liability for the payment of any expenses incurred
in serving a summons upon you in any other manner permitted by law... [T]his form must be
signed by you personally or by a person authorized by you to acknowledge receipt of summons.
Section 415.30 provides that this summons is deemed served on the date of execution of an
acknowledgment of receipt of summons.”

1 Plaintiff then sought to have defendant Sady served by the U.S. Marshal, although
2 he had never filed an in forma pauperis application. On July 22, 2005, plaintiff filed another
3 letter repeating that he had served defendant Sady by first class mail as well as personally, and
4 included a copy of his trust account to indicate when his account had had the cost of postage
5 drawn against it. The court notes that it is not clear from his filing that the postage charges noted
6 correspond with a date on or near a date plaintiff avers that he served process via first class mail,
7 nor that they include, as he asserts, the requisite first class postage prepaid on a return envelope.
8 However, in these circumstances and although it is extremely belated and the application is
9 incomplete, the court will construe plaintiff's filing of the trust account statement, which covers a
10 five-month period from January to May of 2005, as a request to proceed in forma pauperis and
11 will grant plaintiff's application. No further filing fee will be assessed.

12 In accordance with the above, IT IS HEREBY ORDERED that:

13 1. Plaintiff's request for leave to proceed in forma pauperis is granted; however,
14 no further filing fee will be assessed as it has been paid in full.

15 2. Service is appropriate for the following defendant: W. N. Sady.

16 3. The Clerk of the Court shall send plaintiff one (1) USM-285 form, one
17 summons, an instruction sheet and a copy of the complaint filed August 27, 2004.

18 4. Within thirty days from the date of this order, plaintiff shall complete the
19 attached Notice of Submission of Documents and submit the following documents to the court:

- 20 a. The completed Notice of Submission of Documents;
- 21 b. One completed summons;
- 22 c. One completed USM-285 form for each defendant listed in number 2
- 23 above; and
- 24 d. Two copies of the endorsed complaint filed August 27, 2004.

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/s/ Gregory G. Hollows

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Defendants.

NOTICE OF SUBMISSION
OF DOCUMENTS

_____/

Plaintiff hereby submits the following documents in compliance with the court's
order filed _____:

1 completed summons form

1 completed USM-285 form

2 copies of the August 27, 2004
Complaint

DATED:

Plaintiff